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## Professor Jones and the Constitution

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# PROFESSOR JONES AND THE CONSTITUTION

Henry Paul Monaghan\*

Professor Harry Jones's elegant and stimulating Waterman lectures<sup>1</sup> begin on a salutary note. Professor Jones rightly reminds us that, first and foremost, a constitution is not exclusively or primarily a limitation on the exercise of political power, but rather is a charter for its exercise. Accordingly, to view the Constitution as "all brakes and no engine" suggests a serious and fundamental myopia, albeit an understandable one given the popular preoccupation with the Supreme Court's role in vindicating guarantees of civil liberty. But that preoccupation, Professor Jones notes, does more than distort the meaning of the Constitution; it ignores an historically important aspect of the role of the Supreme Court and of the lower federal courts. These courts "were brought into the picture initially as part of . . . the *engine*"<sup>2</sup> of federalism to secure effective enforcement of federal law. Professor Jones thus insightfully links the creation of the lower federal courts with the Supreme Court's appellate jurisdiction over the state courts; both serve as institutional safeguards for the broad policies expressed in the supremacy clause.

I do not propose to discuss Professor Jones's observation that most of the "eight issues of great historical consequence for American constitutionalism"<sup>3</sup> were not "authoritatively disposed of by . . . constitutional adjudication."<sup>4</sup> Although Professor Jones and I might differ in emphasis or detail, I think he is fundamentally correct in emphasizing how much of the basic constitutional structure had been shaped by forces other than the judicial process. In my brief comment, I would like to focus my attention on Professor Jones's view of the Supreme Court.

Professor Jones introduces us to his conception of the Supreme Court through his own contact with constitutional law in 1933, 1947 and 1978. Noting the great doctrinal shifts occurring during these

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1. Jones, *The Brooding Omnipresence Of Constitutional Law*, 4 Vt. L. Rev. 1 (1979).

2. *Id.* at 6.

3. *Id.* at 14.

4. *Id.*

periods, Professor Jones observes that the body of substantive constitutional doctrine is "largely restated by the Supreme Court at far briefer intervals"<sup>5</sup> than the American Law Institute restates the law of contracts. These observations lead Professor Jones to advance views of the Court's role with which I am in serious disagreement.

### 1. *The Supreme Court as Umpire.*

Apparently in reliance on the previously noted doctrinal shifts, Professor Jones rejects the "common practice" of viewing the Court as "a constitutional umpire" which settles various constitutional claims, because the Court "unlike other umpires, can and on occasion does change the rules while the game is going on."<sup>6</sup> What is meant by the Court's "changing the rules" is never made clear, but Professor Jones thinks that the Court has considerable "discretion" with respect to basic matters—that it possesses considerable discretion in the "strong" sense, to borrow the philosopher's vocabulary.<sup>7</sup> Apparently he thinks that the Court can, within generous limits, do pretty much as it sees fit, for he emphasizes the "vast responsibilities" inherent in the Court's "virtually final *authority* to determine for itself the rules it will apply in the course of the game."<sup>8</sup> Surely this conclusion fails to make clear the necessary distinction between description and prescription. That the Court has on occasion exercised a *power* to change the rules does not support the conclusion that it has *authority* to do so. H.L.A. Hart makes the point very clearly:

At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of the authority to make those decisions which cannot be challenged within the system. . . . The adherence of the judge is required to maintain the standards, but the judge does not make them.<sup>9</sup>

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5. *Id.* at 20.

6. *Id.*

7. *E.g.*, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-33 (1977).

8. 4 VT. L. REV. at 21. (emphasis added).

9. H.L.A. HART, *THE CONCEPT OF LAW* 141-42 (1961). See also C. Friedrich, *Authority, Reason and Discretion*, in *AUTHORITY* (C. Friedrich ed. 1958).

I submit that it is not acceptable to view the Supreme Court as an institution with power to "change the rules," in the sense used by Professor Jones. The Court itself, correctly recognizing that public acceptance of judicial review depends in no small measure on a widely shared and deeply felt belief that the justices themselves are lions under the throne, has never overtly subscribed to such a view of its authority. Nor should it do so, for it is "of the essence of constitutionalism," writes Professor Kurland, "that all government—not excepting the courts—is to be contained by established principles."<sup>10</sup> Supported by the great weight of professional opinion, the members of the Court, with perhaps some rare exceptions, have viewed the judicial office as restricting them to a reasoned elaboration of constitutionally embedded principles, however sharply they have differed over the content of those principles.

## 2. *The Common Law Method in Constitutional Adjudication.*

In a striking sentence Professor Jones tells us: "The stabilizing and enduring element in constitutional law, *as in any other field of law*, is not a continuity of doctrine but a continuity of authority, tradition and process."<sup>11</sup> The conclusion, of course, follows from Professor Jones's view of the Court's role as a rule-changing umpire. But it also captures another important thesis, namely that there is no real difference between constitutional adjudication and common law adjudication. Thus Professor Jones emphasizes the role of precedent in both systems of adjudication; he quotes with approbation Holmes's and Cardozo's recognition of the "legislative" grounds of judicial decisions; and he states that in "our notions concerning the nature of the judicial process in constitutional cases *as in other cases*, we are all legal realists to one degree or another and so the heirs of Holmes and Cardozo, of Pound and Karl Llewellyn."<sup>12</sup> Professor Jones does not discuss concrete cases; and accordingly, it is unclear whether we are asked to consider this comment as a normative or as a descriptive statement of the relationship between common law and constitutional adjudication. If I understand him cor-

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10. P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 8 (1970).

11. 4 VT. L. REV. at 20. (emphasis added).

12. *Id.* at 24. (emphasis added).

rectly, however, Professor Jones has assimilated too completely constitutional and common law adjudication.

Let me give some concrete focus to my concerns. We are now deeply immersed in an important era in constitutional law theorizing, for attention is increasingly being concentrated upon what may fairly be characterized as "fundamental" or "basic" questions, rather than the doctrinal elaboration which characterized academic writing during the long period of the Warren Court. The concern with "fundamentals" is most evident in the debate now surrounding the fourteenth amendment. The core question is one of sources—which of the many possibilities can properly be relied on in determining the amendment's meaning. General agreement exists that, whatever the intentions of its framers and ratifiers, the fourteenth amendment now must be read to authorize the Court to impose most of the values contained in the Bill of Rights upon the states. The crucial issue, therefore, is the extent to which the amendment authorizes judicial resort to values not specified in the constitutional text or the structure it creates, and the current discussion should be read in that light. A spectrum of strongly held positions bearing on that question has now emerged—from Raoul Berger's view that section one of the fourteenth amendment was initially designed for the very limited and narrow purpose of guaranteeing blacks equality with respect to certain specified civil (not political or social) rights, such as to contract and to hold property,<sup>13</sup> to that of Professor Tribe, who reads it as authorizing a broad range of nontextually based rights, including affirmative claims against the government for minimally adequate levels of housing, welfare, and medical assistance.<sup>14</sup>

In an important series of articles,<sup>15</sup> soon to be gathered into a book, Professor John Ely adopts a middle position. Professor Ely argues that the fourteenth amendment sanctions careful judicial

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13. R. BERGER, *GOVERNMENT BY JUDICIARY* 18-19 (1977).

14. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977). For a brief review, see Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L.L. REV. 117 (1978) [hereinafter cited as Monaghan].

15. Ely, *Constitutional Interpretivism: Its Allure And Impossibility*, 53 IND. L.J. 399 (1978); Ely, *Toward A Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); Ely, *Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

scrutiny of legislation which bears heavily and unequally upon those underrepresented in the political process. But Professor Ely rejects judicial efforts at the formulation of "fundamental rights, values, or principles" which lack solid grounding in the constitutional text or structure. Any judicial enforcement of norms based on neither text nor structure *against the contrary determinations of the political process* suffers from two closely intertwined defects. First, all such efforts reduce themselves to nothing more than the imposition of a judge's own value preferences on the political organs of government. Second, any such judicial conduct conflicts with the core institutional settlement embodied in the Constitution and reinforced by its amendments—the constitutional scheme of representative government which assigns policy-making functions to the political organs of government. These objections seem to me insurmountable, given my belief that no satisfactory evidence exists to show that judicial development of a *lex non scripta* reflects the purpose of either the drafters or ratifiers of the eighteenth century Constitution or of the Civil War amendments.<sup>16</sup>

At bottom, this current debate is over the significance of "principled" constitutional decisionmaking. The standing premise that constitutional decisions must be "principled" has been joined by some with a different premise, namely, that the Supreme Court could resort to wholly extraconstitutional sources to develop constitutional principles. In a widely acclaimed essay published in 1959, Professor Henry Hart argued that the "structure of American institutions" predestined the constitutional courts "to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles."<sup>17</sup> A few years later, Professor Bickel echoed the same theme.<sup>18</sup> Still more recently, Professor Cox endorsed the appeal to nontextual principles as attesting to "the strength of our natural law inheritance in constitutional adjudication"<sup>19</sup>—a tradition which he thought "unwise as well as hopeless to resist."<sup>20</sup>

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16. Monaghan, *supra* note 14. See also Monaghan, *Taking Supreme Court Opinions Seriously*, — MD. L. REV. — (1979).

17. Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

18. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 25-26 (1962).

19. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113 (1976).

20. *Id.*

While the writers differ sharply over the specific content of fourteenth amendment principles, each endorses some form of substantive due process,<sup>21</sup> for each believes that the fourteenth amendment empowers the Court to articulate and develop nontextually based "fundamental" values or principles, so long as the resulting decisions are adequately "principled." But, of course, the requirement of principle demands nothing with respect to the sources of principle; and accordingly, any theory of substantive due process is open to the objections of subjectivity and representative democracy previously discussed.<sup>22</sup> My own view is that these objections are overwhelming, but this conclusion still leaves one of my persuasion with the problem of whether the currently dominant tradition is so embedded in the constitutional order that it is "unwise" or "hopeless" to resist it. The present debate is, therefore, of vast importance; for I think it obvious that beneath the apparently considerable doctrinal uncertainty in the Supreme Court in interpreting the reach of the fourteenth amendment is an increasing willingness on the Court's part to embrace openly and fully some conception of substantive due process.<sup>23</sup>

Professor Jones does not discuss this debate, but I doubt whether he shares my view as to the legitimacy of the Court's invocation of extraconstitutional values. I say this because of his apparent endorsement of the complete application of the common law method to constitutional adjudication. But the common law analogy is a limited one. Whatever the overlappings in the methodology of decisionmaking between the two forms of adjudication, an important substantive difference is inescapable. In a common law case virtually no one disputes the law-making authority of the court. But that authority is precisely what is in dispute in constitutional cases. In constitutional cases the Court is being asked to annul the ordering made by the political organs of government—the very organs

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21. Analytically, substantive due process includes judicial protection of the values contained in the Bill of Rights, such as freedom of speech. That development, right or wrong, is far too embedded to admit of much controversy. The customary meaning of substantive due process, and I so use it here, is the invocation of either the due process or equal protection clause to impose nontextually based values, or principles, upon the political process. Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

22. See text accompanying note 16 *supra*.

23. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

which concededly have the ultimate law-making authority in the common law context. It is one thing for a court to annul the political judgment when vindicating values or norms fairly referable to the constitutional text or structure. Quite a different theory is required to defend the use of sociological jurisprudence—or any other school—as the source of a constitutional *lex non scripta*.<sup>24</sup>

A fully satisfactory account of the role of the Supreme Court in our constitutional scheme must have both descriptive and normative dimensions. I think that Professor Jones's account is unsatisfactory in both aspects. The Supreme Court has not on the whole assumed the role of an umpire with authority to change the rules. Nor should it do so, at least on the basis of any supposed analogy to the conduct of the common law courts. For, as I have indicated, that analogy is necessarily a limited one given the fundamental presuppositions of our constitutional order.

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24. See Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975), where I explored the possibility of a limited development of a common law approach, one which was wholly subordinate to congressional authority. I too have been criticized for resort to common law analogies. Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1132 (1978).